VIRGINIA LAW REGISTER

R. T. W. DUKE, JR., *Editor.*

T. B. BENSON AND L. B. WATERS, *Associate Editors.*

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The State Bar Association.

The Virginia State Bar Association meets at the White Sulphur Springs on Wednesday, August 4th, and promises to be a pleasant meeting. At the time we go to print no programme of the proposed proceedings has been issued; but it can be depended upon that there will be much of interest and a most delightful social meeting.

Alienation of Affection. Liability of Parents.

Virginia has been remarkably free from suits of the character mentioned above, and we believe the case of Ratcliffe, etc. *v.* Walker, decided by our Supreme Court of Appeals, June 10, 1915, is the first in the State; certainly the first to reach the Court of Appeals. It is one, not only of novelty, but of much interest, and the opinion of the Court delivered by Judge Kelley is an able presentation of the question involved; for the main point in the case is as to the liability of parents and brothers and sisters for alienating the affections of the daughter and sister who had intermarried with the plaintiff. The latter recovered $5,000.00 damages in the lower Court and our Supreme Court affirms the judgment.

An inspection of the opinion convinces us that no other conclusion could have well been reached, for the evidence as set out in that opinion clearly establishes both malice and conspiracy on the part of the Ratcliffes to induce the bride of a few hours to leave her husband and practically end all relations between them.

Our Court lays down the rule as well settled that there is a material difference between the acts of a parent and those of a mere intermeddler in matters of this sort; and that a parent has

not only a right, but is charged with a duty to consult the best interests of the child, and advice, persuasion and inducement upon his part, if fairly and honestly used, will not render him liable in cases of desertion resulting from such advice, persuasion and inducement. The burden of proof is upon the party suing, to show malice and willful interference, but if shown the parent or near relation is liable in damages. The Court quotes numerous authorities to sustain this proposition, which seems well settled law and is now the law in this jurisdiction, though we trust we may be pardoned in saying that we hope it will be a long time in this old Commonwealth before any other application of these legal propositions becomes necessary.

The Webb-Kenyon Act. Interstate Commerce. Intoxicating Liquors.

In the case of Taylor *v.* Commonwealth, decided by our Supreme Court June 10, 1915, the Court sustained the constitutionality of the Webb-Kenyon Act, thus falling into line with numerous decisions of many of the states and inferior Federal tribunals. So that the law is now established in this State that no intoxicating liquor can be shipped into this State from another State when such liquor is intended by any person interested therein to be received, possessed, sold or in any manner used either in the original package or otherwise in violation of any law of the State.

Parol Agreements. Oral Declaration of Trust in Land Lawful.

The case of Shield *v.* Adkins, decided by our Supreme Court June 10, 1915, reaffirms the doctrine laid down in Young *v.* Holland, upon which we commented in Vol. 1 N. S. LAW REGISTER, p. 149 (June 1915), that an express trust in real estate can be created in this State by a parol agreement, but refers to Plunkett *v.* Bryant, 101 Va. 814, as to the well settled principles upon which a Court of Equity will act in avoiding the Statute of Frauds and enforcing a parol agreement for the sale of land. It is well to put them down here for ready reference.

1. The parol agreement must be certain and definite in its terms.

2. The acts proved in part performance must refer to, result from, or be made in pursuance of the agreement proved.

3. The agreement must have been so far executed that a refusal of full execution would operate a fraud upon the party and place him in a situation which does not lie in compensation.

The Adjournment of Supreme Court of the United States.

On Monday, June 21, the Supreme Court of the United States adjourned the October, 1914, term. This adjournment completes the twenty-fifth year of the operation of the present judicial system instituted by the Evarts Law of 1890 creating the nine Circuit Courts of Appeal, with the object of relieving the Supreme Court of the tremendous pressure of cases which was congesting its docket. At the time of the establishment of this system the Supreme Court was three years behind in its work. On the day of the adjournment of the October, 1914, term the Court was only one year behind. In these twenty-five years, ten thousand, seven hundred and sixty-six cases have been filed and eleven hundred and forty-nine disposed of, including twelve hundred cases which were on the docket when the new Supreme Courts of Appeal came into existence. During October, 1914, the Supreme Court disposed of five hundred and thirty-nine cases.

The Internal Revenue War Tax.

Late rulings of the Commissioner of Internal Revenue are as follows:

No tax need be paid on transfers of stock from the name of a deceased person to his executor or administrator, but transfers from the executor or administrator to a trustee, or from the trustee to a beneficiary, are taxable.

Bonds of an American corporation issued, registered and sold in a foreign country are not required to be stamped.

Air-domes are taxable according to seating capacity. Air-

dome adjacent to a theatre may be operated without additional tax if its seating capacity is no greater than that of the theatre and performances are not given simultaneously.

A recent decision holds that certificates issued by state officers need not be stamped.

A conveyance of property in a foreign country is not taxable even though the deed is executed and delivered in this country.

The "Police Powers" of the States, As Construed by the Supreme Court of the United States.

We are very often sorely put to it in attempting to reconcile the decisions of the great tribunal which is the Court of last resort in all federal matters. It seems sublimely indifferent as to whether its decisions conflict or not, and when it attempts to reconcile them the line is often so closely drawn that we need magnifying glasses to see it. Several decisions handed down in June seem very much in conflict, but in one case the Court does not make even an allusion to the case seemingly in conflict, and in the other it draws what seems to us a very fine distinction between that case and others previously decided.

Of course the "Police Power" of a state is a term which as Count Smorltork might have said "surprises by himself a difficult study of no inconsiderable magnitude." And therefore each case must to a certain extent stand alone. Yet in the case of Chicago & A. R. Co. *v.* Traubarger, decided June 1, 1915, the Court uses the following language:

"It is established by repeated decisions of this Court that neither of these provisions of the Federal Constitution"—i. e. the contract clause and the due process clause—"has the effect of overriding the power of the state to establish all regulations reasonably necessary to secure the health, safety or general welfare of the community; that this power can neither be abdicated nor bargained away and is inalienable even by express grant; and that all contracts and property rights are held subject to its fair exercise. Atlantic Coast Line, etc. *v.* Goldsboro, 232 U. S. 548, and cases cited. And it is also settled that the police power embraces regulations designed to promote the public convenience or

the general welfare and prosperity as well as those in the interest of the public health, morals or safety. Lake Shore, etc. *v.* Ohio, 173 U. S. 285; C. B. & Q. R. Co. *v.* Illinois, 200 U. S. 561, 4 Ann. Cases 1175; Bacon *v.* Walker, 204 U. S. 311."

In this case the State of Missouri, by an Act passed in 1907, made it the duty of every corporation owning, operating or constructing any railroad in the State within three months after the completion of the same to construct transverse openings in its right of way and roadbed to take care of surface water, and imposed a fine and liability for damages for neglect in doing the same.

The defendant's railway was constructed in 1872, first with a trestle, and in 1895 with an embankment, across plaintiff's low grounds, which were flooded in 1908 owing to lack of the railroad having opening in the embankment sufficient to cary off this flood. Plaintiff recovered damages, and a penalty of $100 was inflicted, and the judgment sustained by the Supreme Court of Missouri. The railroad insisted that the act impaired the obligations of its charter and took its property without compensation, and deprived it of the equal protection of the laws.

It contended that the common enemy doctrine of the common law respecting surface water was in force in Missouri when its charter was granted and the contracts entered into between itself and the landowners, and was therefore part and parcel of its irrepealable charter and these contracts and could not be impaired by subsequent legislation.

But the Court overruled all of these contentions and upon the "common enemy" question said as follows:

> "Next, it is insisted that for all purposes except those covered by the Act of 1907, Missouri has at all times adhered to the common-law rule that surface water is a common enemy, against which every landowner may protect himself as best he can, and that this applies to and protects railroads as well as other landowners. Abbott *v.* Kansas City, St. J. & C. B. R. Co. (1884) 83 Mo. 271, 280 et seq., 53 Am. Rep. 581; Jones *v.* St. Louis, I. M. & S. R. Co., 84 Mo. 151, 155; Schneider *v.* Missouri P. R. Co., 29 Mo. App. 68, 72; Ready *v.* Missouri P. R. Co., 98 Mo. App. 467, 72 S. W. 142. The conclusion sought to be drawn is that the common-law rule, as it existed at the time the railroad was built and the right

of way acquired, entered into the contract between the state and the company, and into the contracts between the company and the landowners from which its right of way was acquired, and that the immunity from prosecution and from private action alike was in the nature of an appurtenance to the land, the enjoyment of which could not be impaired by subsequent legislation.

Of the cases cited in support of this contention the only one that has a semblance of pertinency is Muhlker *v.* New York & H. R. Co., 197 U. S. 544, 49 L. Ed. 872, 25 Sup. Ct. Rep. 522, and this is really distinguishable. There the right in question was the easement of light and air, which of course pertains closely to the use and enjoyment of the land. But the right to maintain a railroad embankment or other artificial structure in such a manner as to deflect surface water from its usual course, and thereby injure the land of another, has little reference to the substantial enjoyment of the railroad right of way. Nor is it at all essential to the protection of the railroad itself from surface water. It can not reasonably be contended that a railroad can not be maintained and operated as safely and as conveniently over a bridge, trestle, culvert, or other opening calculated to admit the passage of surface water, as upon a solid embankment, or that there is any substantial advantage in favor of the latter except that it avoids the expenditure ecessary to be made for the construction and maintenance of openings in order that the embankment shall no longer be the occasion of injury to the lands of others. The previous immunity from responsibility for such injury was nothing more than a general rule of law, which was not in terms or by necessary intendment imported into the contract. For just as no person has a vested right in any general rule of law or policy of legislation entitling him to insist that it shall remain unchanged for his benefit (Munn *v.* Illinois, 94 U. S. 113, 134, 24 L. ed. 77, 87; Hurtado *v.* California, 110 U. S. 516, 532, 28 L. ed. 232, 237, 4 Sup. Ct. Rep. 111, 292; Buttfield *v.* Stranahan, 192 U. S. 470, 493, 48 L. ed. 525, 534, 24 Sup. Ct. Rep. 349; Martin *v.* Pittsburg & L. E. R. Co., 203 U. S. 284, 296, 51 L. ed. 184, 191, 27 Sup. Ct. Rep. 100, 8 Ann. Cas. 87), so an immunity from a change of the general rules of law will not ordinarily be implied as an unexpressed term of an express contract. See Gross *v.* United States Mortg. Co., 108 U. S. 477, 488, 27 L. ed. 795, 798, 2 Sup. Ct. Rep. 940; Pennsylvania R. Co. *v.* Miller, 132 U. S. 75, 83, 33 L. ed. 267, 272, 10 Sup. Ct. Rep. 34.

In conclusion the Court held that independent of anything else the statute in question was passed under the police power of the State for the general benefit of the community at large, for the purpose of preventing unnecessary and widespread injury to property, and sustained the Missouri Court in allowing damages and imposing the penalty.

We have no fault to find with this decision, which seems to us in every way consistent with law and reason; but in an opinion handed down the same day and delivered by the same Justice, Pitney, in the case of A. T. and S. F. R. *v.* Vosburg, we find the "Police Power" did not permit a State to have a statute allowing a reasonable fee to a shipper who successfully sues a railroad company for failure to furnish cars, because no such allowance was made in favor of the company in event of its suing successfully under the same statute against a shipper who failed to use the cars promptly. Mr. Justice Pitney holds that the statute in question, enacted by the Kansas Legislature is properly to be regarded as a police regulation. This being the case we can well understand how the Supreme Court of Kansas, upon a review of certain decisions of the Supreme Court, *viz.*, Gulf, C. & S. F. R. Co. *v.* Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; Atchison, T. & S. F. R. Co. *v.* Matthews, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609; Fidelity Mut. L. Asso. *v.* Mettler, 185 U. S. 308, 46 L. ed. 922, 22 Sup. Ct. Rep. 662, and Farmers' & M. Ins. Co. *v.* Donbey, 189 U. S. 301, 47 L. ed. 821, 23 Sup. Ct. Rep. 565, held:

> "That since the act in question is a police regulation prescribing duties properly enforceable by penalties in the form of *per diem* forfeits and attorney fees recoverable in suitable actions, and because of the control of railroad companies over their cars, their capacity to disturb and obstruct trade, and the helplessness of shippers when cars are carelessly or arbitrarily withheld, railroad companies might properly be placed in a class by themselves for the purpose of securing sufficient car service, and that the equal protection of the law required no more than that all railroad companies should be penalized alike."

The Kansas Court, in conclusion, said:

> "It is true that shippers may offend somewhat by failing to make expeditious use of cars when furnished them. Whether

> or not they too shall be penalized, and if so to what extent, is a fit subject for legislative consideration. But the railroad companies can not complain if the legislature chooses to exempt shippers from any punishment, or chooses to prescribe some penalty suitable to the nature of their delinquency, but different from that imposed upon the companies themselves."

And yet, in spite of the "Police Power," and, as it looks to us, in the teeth of A. T. & S. F. R. Co. *v.* Matthews, 174 U. S. 96, 41 L. ed. 666 and Farmers' & M. Ins. Co. *v.* Dabney, 189 U S. 301, 47 L. ed. 821 and M. K. T. R. Co. *v.* Cade, 233 U. S. 642, 58 L. ed. 1135, Mr. Justice Pitney, the whole Court concurring, holds the Kansas statute a violation of the equal protection of the laws guaranteed by the 14th Amendment. The three cases last cited were every one statutes allowing an attorney's fee to one side and not to the other, and in each case the constitutionality of the statutes was affirmed. It is true that in the case under discussion the Court attempts to differentiate between these cases and this one, but the line is so finely drawn we do not wonder that the Supreme Court of Kansas thought it was following a long line of precedents laid down by the Supreme Court of the United States, when it decided the statute constitutional.

In the case of Chicago, etc. *v.* Traubarger, *supra*, the Court holds that the police power of the State is not overridden by the 14th Amendment; In T. T. & S. R. Ry. *v.* Vosburg it holds that a police regulation is like any other subject to the "equal protection" clause of the 14th Amendment. Neither case alludes to the other. It is too hot to try and reconcile these apparent contradictions.

The Federal Employers' Liability Act. Conscious Suffering Prior to Death—Damages Therefor. Survival of Right of Action.

And speaking of contradictions we quote the syllabus in St. Louis Iron Mountain Ry. Co. *v.* Craft, decided by the Supreme Court of the U. S. June 1, 1915, not only as a case of much interest, but in order to call attention to the fact that

§ 2 of the syllabus might prove misleading unless the opinion is carefully read. That syllabus is as follows:

1. The jury reasonably could find that a railway employee endured conscious pain and suffering during the half hour which he survived after a car had passed partly over his body, where there was evidence that while he was pinned beneath the car he was "groaning every once in a while," and that during the efforts of others to extricate him from his position "he would raise his arm" and "try to pull himself."

2. Such pain and suffering as are substantially contemporaneous with death, or are mere incidents to it, as well as the short periods of insensibility which sometimes intervene between fatal injuries and death, afford no basis for a separate estimation or award of damages under the act of April 5, 1910 (36 Stat. at L. 291, chap. 143, Comp. Stat. 1913, § 8662), amending the employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657), by providing that any right of action given by that act to the person suffering injury shall survive to the personal representative for the benefit of the same beneficiaries in whose behalf the right of action created by the original act is given, but that there shall be only one recovery for the same injury.

3. The recovery in an action brought by the personal representative of a deceased railway employee under the employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657), as amended by the act of April 5, 1910 (36 Stat. at L. 291, chap. 143, Comp. Stat. 1913, § 8662), may include both damages for the decedent's conscious pain and suffering during the period intervening between fatal injuries and death, and damages for the pecuniary loss sustained by the relative or next of kin for whose benefit the action is brought, in view of the provision of the amendatory act that any right of action given by the original act to a person suffering injury shall survive to the personal representative for the benefit of the same beneficiaries in whose behalf the right of action for death is given, although the amendment concludes with the clause, "but in such cases there shall be only one recovery for the same injury."

Now § 2 of the above syllabus is to all appearances directly in conflict with § 3, but an inspection of the opinion of the Court shows that no such point was decided, though the Court, citing

Barton *v.* Brown (The Corsair) 145 N. S. 335, says, "that to avoid any misapprehension it is well to observe that the case is close to the border line, for such pain and suffering as are substantially contemporaneous with death or mere incidents to it, as also the short periods of insensibility which sometimes intervene between fatal injuries and death afford no basis for a separate estimate or award of damages under statutes like that controlling here."

But this is mere obiter and in no way necessary to the decision of the case; for the Court says it is proved in the case—or rather "That the jury could reasonably find" that the deceased while he lived after the accident, endured conscious pain and suffering as the result of his injuries, and expressly decides that under the amended act the right to recover damages for such pain and suffering survived to the personal representative and could be recovered.

Although originating in the same wrongful act or neglect, the two claims—i. e. for wrong to the injured person and wrong to the beneficiaries in their pecuniary loss by his death—are quite distinct, the Court says, no part of either being embraced in the other. One begins where the other ends and a recovery upon both in the same action is not a double recovery for a single wrong, but a single recovery for a double wrong.

It is true the statute as amended provides that "in such cases there shall be only one recovery for the same injury," but the Court holds that this claim is not intended to restrict the personal representation to one right to the exclusion of the other or to require that he make a choice between them, but to limit him to one recovery of damages for both, and so avoid needless litigation in separate actions of what would better be settled once for all in a separate action.

The case is of decided interest as introducing into our jurisprudence a new phase of liability for injuries as well as death, and we think is properly decided and most admirably reasoned out.